

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

FRIDAY, THE 10TH AUGUST 2007 / 19TH SRAVANA 1929

WA.No. 892 of 2007(E)

AGAINST THE JUDGEMENT IN RP.597/2006 Dated 12/02/2007

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APPELLANT: RESPONDENTS 1 & 2 IN REVIEW PETITION/PETITIONERS

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1. BINU CHANDRASEKHARAN K.,
S/O.CHANDRASEKHARAN, AGED 38, KALLISSERY HOUSE,
KONGORPILLY P.O., ERNAKULAM DISTRICT.
 2. SMT.ANJI S.RETHNAM, SREEMANGALAM,
K.R.A.45 A THOTTAM, MANAKKAD P.O.,
THIRUVANANTHAPURAM 659 009.

BY ADV. SRI.SAJEEV KUMAR K.GOPAL
SRI.BINOY VASUDEVAN

RESPONDENTS: PETITIONER & RESPONDENTS 3 & 4 REVIEW PETITION

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1. THE KERALA PUBLIC SERVICE COMMISSION,
REPRESENTED BY ITS SECRETARY, PATTOM,
THIRUVANANTHAPURAM.
 2. STATE OF KERALA, REPRESENTED BY THE
PRINCIPAL SECRETARY TO GOVERNMENT,
HEALTH AND FAMILY WELFARE DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM.
 3. THE DIRECTOR,
DIRECTORATE OF HOMOEOPATHY,
THIRUVANANTHAPURAM.

R1 BY ADV. SRI P.C. SASIDHARAN, STANDING COUNSEL
R2 BY GOVT. PLEADER SRI K. SANDESH RAJ

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 27/06/2007 ALONG
WITH WA NO. 893 OF 2007 WA NO. 894 OF 2007 WA NO. 902 OF 2007
WA NO. 935 OF 2007 WA NO. 1295 OF 2007 THE COURT ON 10/08/2007
DELIVERED THE FOLLOWING:

K.S. RADHAKRISHNAN & ANTONY DOMINIC, JJ.

Writ Appeal Nos. 892, 893, 894, 902, 935 and 1295 of 2007

Dated: 10th August 2007

JUDGMENT

Radhakrishnan, J.

Petitioners in all these cases seek the benefit of the decision of a Division Bench of this court in Stalin v. State of Kerala (2006 (1) KLT 493) for appointment to the post of Pharmacist (Homoeo) in the department of Homoeopathy on the plea that they were included in the rank list published by the Public Service Commission in the districts of Pathanamthitta, Alappuzha and Kozhikode.

2. The first petitioner in W.P.C. No 12308 of 2005 was ranked as No. 15 and the second petitioner was ranked as No 25 in the rank list published by the P.S.C in the Pathanamthitta district on 16.12.2002. Petitioner in W.P.C. No 20111 of 2006 was ranked as No 23 in the Pathanamthitta district. Petitioner in W.P.C. No 21238 of 2006 was ranked as No 3 in the Alappuzha district. Petitioner in W.P.C. No 12909 of 2006 who belongs to scheduled caste community entitled to reservation was ranked as No 23 in the Pathanamthitta district. Petitioners in W.P.C. No 463 of 2006 were

shown as rank Nos 6,7 10 and 2 (in the supplementary list for SC/ST candidates) in the Kozhikode district. Petitioners submit that rank list published by the P.S.C had a life of three years and all of them should have been appointed on the strength of the rank list published by the P.S.C in accordance with the principle laid down by the Division Bench in Stalin's case, supra.

3. The first petitioner in W.P.C. No 12308 of 2005 and certain others had approached this court earlier filing O.P. No 31945 of 202 seeking a direction to the P.S.C to advise them for appointment to the post of Pharmacist (Homoeo) from the rank list published in pursuance of the notification issued by the P.S.C on 27.10.1998. When the writ petition came up for hearing it was pointed out that the rank list published pursuant to the above mentioned notification was already cancelled and therefore no direction could be issued to the P.S.C or to the State of Kerala or to the Director of Homoeopathy to report vacancies for appointment from the cancelled list. Submission was made that the rank list was cancelled since Government of Kerala with effect from 12.04.1999 had laid down fresh qualification for the post of Pharmacist (Homoeo) by framing Special Rules for the Kerala Homoeopathy Subordinate Service vide

SRO No 397/1999 dated 12.04.1999. Learned single judge of this court disposed of O.P. No 31945 of 2002 on 11.08.2004 leaving it to the parties to approach the Government so as to raise their grievances. Petitioners submit that they had submitted representations which led to the Government issuing letter No 43413/J3/04/H & FWD dated 4.2.2005 requesting the P.S.C to make appointments to the post of Pharmacist (Homoeo) from the list published. P.S.C did not take any steps to give effect to the government order to honour the rank list already published and hence the third petitioner in O.P. No 31945 of 2002 and another approached this court filing W.P.C. No 12308 of 2005 seeking a direction to the P.S.C to advise them for the vacancies reported during the currency of the list after taking into consideration vacancies reported for appointment to the post of Pharmacist (Homoeo) according to their rank and turn following the principles of communal rotation. Learned single judge following the judgment of the Division Bench in Stalin's case, supra allowed the writ petition and directed the P.S.C to take into consideration the vacancies reported for appointment to the post of Homoeo Pharmacist during the currency of the list and to advise the petitioners in O.P. No 12308

of 2005 as per their turn, within a period of one month from the date of receipt of; the judgment. The learned judge also held as follows:

“ A Division Bench of this court in the judgment in W.P.(C) No 15162 of 2005 has taken the view that the list already prepared on the basis of notification issued prior to the amended qualification shall be continued to be operated for the reason that the amendment has got only perspective effect and cannot affect a list which has already come into existence.”

Petitioners in O.P. No 12308 of 2005 later noticed that those who are parties to the Division Bench judgment in Stalin's case sought implementation of that judgment by filing contempt cases. P.S.C defended those contempt cases undertaking that they would honour the judgment by issuing advice memos. Consequently several candidates who figured lower down in the rank list to that of the petitioners were advised and were later appointed as Pharmacists (Homoeo). Petitioners had also filed C.C.C. No 350 of 2006 to give effect to the order and to take action for not implementing the judgment of this court in W.P.C.No 12308 of 2005. While so, P.S.C filed a review petition. R.P.No 597 of 2007 in W.P.C. No 12308 of 2005, to review the judgment stating that a Full Bench of this court in Mohanan v. Director of Homoeopathy (2006 (3) KLT 641 (FB) ruled that Stalin's case, supra was not good law. Petitioners

contended before the learned single judge that subsequent declaration of law would not affect the binding nature of the judgment already rendered on the basis of the law as stood on the date of pronouncement of the judgment and prayed for the dismissal of the review petition. Learned single judge however held as follows:

“I am unable to accept the above contention as a valid ground to reject a petition for review of the judgment. The judgment under review has not become final, in the sense that the review petitioner has not exhausted the remedy of review or appeal. Since the basis for issuing directions to the review petitioner vide judgment dated 14.12.2005 was the law laid down by the Division Bench in Stalin's case, which has now been held to be not good law by the Full Bench, the Commission is entitled to seek for a review of the judgment dated 14.12.2005. Accordingly, the judgment dated 14.12.2005 in W.P.C. No 12308 of 2005 is recalled. The review petition is allowed.”

Learned single judge on the same day heard W.P.C. No 12308 of 2005 and dismissed the writ petition clarifying as follows:

“The petitioners would place reliance on the decision of a Division Bench of this court in Stalin v. State of Kerala (2006 (1) KLT 493). But the ratio of the above decision has been held to be not good law by the Full Bench in Mohanan v. Director of Homoeopathy (2006 (3) KLT 641 (FB). The Full Bench decision is against the petitioners. The writ petition is therefore dismissed.”

Contempt Case No 350 of 2006 filed for non implementation of the judgment dated 14.12.2005 was also dismissed. Aggrieved by the judgment in W.P.C. No 12308 of 2005 petitioners have preferred

W.A. No 1295 of 2007. Aggrieved by the order passed in R.P. No 597 of 2006 in W.P.C. No 12308 of 2005 petitioners preferred W.A. No 892 of 2007.

4. Sri Sajeevkumar K. Gopal, counsel appearing for the petitioners in O.P. No 12308 of 2005 submitted that the learned single judge was not justified in reviewing the judgment in W.P.C. No 12308 of 2005. Counsel submitted that the judgment dated 14.12.2005 had attained finality on the basis of the judgment in Stalin's case. Counsel submitted, even though Stalin's case, was subsequently reversed by the Full Bench in Mohanan's case, it is not a ground to review the judgment which had attained finality. Counsel submitted that power of review can be exercised by this court only under Order XLVII Rule 1 of Code of Civil Procedure. Reference was also made to Explanation given to Order XLVII Rule 1 C.P.C which says that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Counsel also referred to the judgment of the apex court in Union of India v. B. Valluvan and others (2006 (8) S.C.C. 686). In support of

the contention counsel also made reference to the decision in Union of India v. M.H. Krishna Murthy and others (1973 (3) S.C.C. 559). Counsel also submitted that persons who have been shown lower down in the rank list were appointed on the basis of the principle laid down in Stalin's case and also on the basis of the undertaking made by the P.S.C while disposing of the contempt case and hence there is no justification in reviewing the judgment in the case of the petitioners alone denying appointments to them, who are holding higher ranks.

5. Counsel appearing for the petitioners in W.P.C. Nos 21338 of 2006, 12907 of 2006, 20111 of 2006 and W.P.C. No 463 of 2005 also raised similar contentions and submitted that P.S.C is acting arbitrarily in not advising the petitioners to available vacancies, while persons who are lower down in the list were advised and given appointments as Pharmacist (Homoeo). Counsel referred to several decisions of the apex court viz; Ishwar Dutt v. Land Acquisition Collector (AIR 2005 S.C 3165), State of Mysore v. M.H.Krishna Murthy and others (1973(3) S.C.C. 559) and submitted that the P.S.C was acting arbitrarily in not advising them.

6. Counsel appearing for the Public Service Commission would

contend applying the principles laid down by the apex court in Union of India and others v. B. Valluvan and others (2006) 8 S.C.C. 686), that the Special Rules would operate from 12.04.1999 de hors the judgment in Stalin's case. Counsel submitted that candidates were advised from the rank list pursuant to the judgment in Stalin's case so as to avoid contempt of court proceedings and to honour the judgment.

7. We may point out that the Full Bench of this court in Mohanan's case, as we have already indicated, examined the scope of the Special Rules for the Kerala Homoeopathy Subordinate Service, 1999. Full Bench overruled the judgment of the learned single judge in Murugan and others v. State of Kerala and others (I.L.R 1982 (2) Kerala 74). However the Bench took the view that they did not perceive any conflict between Kunju Kunju v. State of Kerala (2005 (1) KLT 364) and Stalin's case, supra (2006 (1) KLT 493) stating that those decisions operate in two different fields. The Bench however felt that the law laid down in both the decisions was the same, namely that in the absence of any indication regarding retrospectivity to the operation of the Special Rules, the appointments pursuant to selection made in accordance with the

Rules in force prior to the introduction of the Special Rules would not be affected by the Special Rules. On a reading of the decisions in Kunju Kunju's case and Stalin's case, we express serious doubt about the opinion expressed by the Full Bench in paragraph 5 of the judgment and we do perceive conflict in the views expressed by the Division Bench in Kunju Kunju's case as well as Stalin's case and we are of the considered view that the Full Bench decision has the effect of overruling Stalin's case. In Stalin's case, the Division Bench has taken the view that the amendment of the Special Rules brought into force during the course of the selection process would not in any way affect the rights of the candidates who were otherwise qualified as on the date of making the application for selection. The Full Bench in fact concluded as follows:

“In the result, we hold that notwithstanding the currency of the rank list prepared and published by the PSC in accordance with the recruitment rules in force prior to the introduction of the Special Rules for the Kerala Homoeopathy Subordinate Service, 1999 with effect from 12.4.1999, the vacancies which arose subsequent to the amendment of the Rules on 12.4.1999 shall be filled up only in accordance with the Special Rules promulgated with effect from 12.4.1999.”

Full Bench in our view was resolving the conflict and has in effect overruled the principles laid down in Stalin's case. The Full Bench

has never declared that the judgment would operate prospectively. In the absence of any such declaration the judgment would operate retrospectively from 12.4.1999 when the Special Rules came into force. Full Bench in Mohanan's case indisputedly did not say that the appointments effected to vacancies which arose subsequent to 12.4.1999 would not be disturbed. Therefore the legal consequences are determined in respect of matters which had taken place in the past meaning thereby rights of parties have to be determined from 12.04.1999. Above legal position is supported by recent decision of the apex court in George P.V and another v. State of Kerala (I.L.R 2007 (2) Kerala 609 (SC). The apex court examined the question of application of prospective operation and held as follows:

“The Full Bench of the High Court indisputably did not say that the promotions which had already been granted would not be disturbed. The judgment of the Full Bench attained finality as special leave petition filed there against was dismissed. Rules as amended by the State of Kerala on 1.7.1980 and 30.8.1984 were upheld.

If the said Rules ultimately were held to be constitutional, it was required to be given effect to. The law declared by a Court is ordinarily affects the rights of the parties. A court of law having regard to the nature of adversarial system of our justice delivery system exercises adjudicatory role. Legal consequences are determined in respect of the matters which

had taken place in the past.

It may be true that when the doctrine of stare decisis is not adhered to, a change in the law may adversely affect the interest of the citizens. The doctrine of prospective overruling although is applied to overcome such a situation, but then it must be stated expressly. The power must be exercised in the clearest possible term. The decisions of this court are clear pointer thereto.

When we apply the principles laid down by the apex court in the above decision, it is clear that the Full Bench decision will operate from 12.4.1999; consequently vacancies which arose subsequent to 12.4.1999 are to be filled up by candidates who possess the qualification as prescribed in the Special Rules for Pharmacist (Homoeo).

8. We shall now examine the impact of the judgment rendered by the learned single judge in W.P.C. No 12308 of 2005 on 14.12.2005. Writ petition has already been disposed of applying the principle laid down in Stalin's case though it was overruled in Mohanan's case. Judgment in W.P.C. No 12308 of 2005 dated 14.12.2005 has already attained finality since no appeal was filed by the P.S.C. P.S.C took steps to unsettle that position by filing a review petition and that review petition was allowed by the learned judge on 12.4.2007 and the judgment dated 14.12.2005 was recalled

and the writ petition was dismissed applying the principle laid down in Mohanan's case by judgment dated 12.2.2007. We are of the view, the mere fact that Stalin's case has subsequently been overruled by the Full Bench in Mohanan's case shall not be a ground for reviewing the judgment which has attained finality. In this connection we will refer to Order XLVII Rule 1. Explanation to XLVII Rule 1 is extracted below:

“Explanation- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment.”

The apex court in Meera Bhanja v. Nirmala Kumari Choudhury (1995 (1) SCC 170) held that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 C.P.C. A review petition can be entertained only on the ground of error apparent on the face of the record and not on any other ground. An error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. The limitation of powers of court under Order 47 Rule 1 C.P.C is similar to the

jurisdiction available to the High Court while seeking review of the orders under Article 226. Reference may be made to the decision of the apex court in Union of India v. Madras Telephone SC & ST Social Welfare Association (2006 (8) SCC 662) wherein the apex court held as follows:

“Having regard to the above observations and clarification we have no doubt that such of the applicants whose claim to seniority and consequent promotion on the basis of the principles laid down in the Allahabad High Court's judgment in Paramanand Lal case have been upheld or recognised by the court or the Tribunal by judgment and order which have attained finality will not be adversely affected by the contrary view now taken in the judgment Madras Telephones. Since the rights of such applicants were determined in a duly constituted proceeding, which determination has attained finality, a subsequent judgment of a court or Tribunal taking a contrary view will not adversely affect the applicants in whose cases the orders have attained finality.”

In Union of India and others v. B. Valluvan and others (2006) 8 S.C.C. 686) the court considered the question of application for review and after referring to Section 114 read with Order XLVII C.P.C held as follows:

“The Division Bench of the High Court committed a serious error in entering into the merit of the matter while exercising its review jurisdiction. The court's jurisdiction to review its own judgment, as is well known, is limited. The High Court, indisputably, has a power of review, but it must be exercised within the framework of Section 114 read with Order 47 of the Code of Civil Procedure. The High Court did not

arrive at a finding that there existed an error on the face of the record. In fact, the High Court, despite noticing the argument advanced on behalf of the Union of India that the first respondent had no legal right to be appointed, proceeded to opine that the panel prepared for filling up of future vacancies should be given effect to. The review of the High Court was not only contrary to the circular letter issued by the Union of India, but also contrary to the general principles of law.”

On the above mentioned principles, we are of the view, learned single judge was not justified in reviewing the judgment dated 14.12.2005 which has attained finality.

9. We however point out that but for the inter-party judgment dated 14.12.2005 the petitioners herein would be governed by the principles laid down by the Full Bench in Mohanan's case. Counsel appearing for the petitioners further submitted that in any view of the matter several persons who figured below them in the rank list were given appointments relying upon the principles laid down in Stalin's case and therefore they are entitled to similar treatment. We are of the view, appointments if any effected by the P.S.C after 12.4.1999 and contrary to the principle laid down by the Full Bench in Mohanan's case, would be irregular appointments but P.S.C had to appoint those persons on the basis of the principle laid down in Stalin's case and at the threat of contempt cases. We are of the view

that the mere fact that P.S.C has committed an illegality in advising persons contrary to the principles laid down by the Full Bench is not a reason for this court to direct them to perpetuate that illegality. The apex court in Union of India v. International Trading Company (2003 (5) SCC 437) held that a party cannot claim that since something wrong has been done in another case, direction should be given for doing another wrong. In such cases there is no discrimination involved. Concept of equal treatment on the logic of Article 14 of the Constitution of India cannot be pressed in to service in such cases. What the concept of equal treatment presupposes is the existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. The apex court held that even if hypothetically it is accepted that a wrong has been committed in some other cases by introducing a concept of negative equality the respondents cannot strengthen their case. They have to establish strength of their case on some other basis and not by claiming negative equality. When we apply the above principles this court will not be justified in giving a direction to the P.S.C to appoint the petitioners contrary to the principles laid down by the Full Bench in Mohanan's case.

10. We are therefore inclined to allow W.A. Nos 892 and 1295 of 2007 on the sole ground that judgment in W.P.C. No 12308 of 2006 has attained finality and no sufficient ground has been made out to review that judgment though we find no merit in the other contentions raised by the counsel in O.P. No 12308 of 2006. Consequently judgment in W.P.C. No 12308 of 2006 dated 14.12.2005 is revived and consequences will follow. Rest of the appeals, W.A.Nos 893, 894, 902, and 935 of 2007 will stand dismissed.

Sd/-

K.S. RADHAKRISHNAN
Judge

Sd/-

ANTONY DOMINIC
Judge

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